COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	)	D.T.E. 01-31 (Phase I)

REPLY BRIEF OF VERIZON MASSACHUSETTS
PUBLIC VERSION

Bruce P. Beausejour
Victor D. Del Vecchio
185 Franklin Street, Room 1403
Boston, Massachusetts 02110-1585

Robert N. Werlin
Stephen H. August
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, Massachusetts 02110

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The local exchange market in Massachusetts is irreversibly open to competition. Nothing proffered by AT&T or the Attorney General can refute this fact. Verizon Massachusetts ("Verizon MA") now should be allowed the flexibility to compete without the continued impediment of outdated regulatory constraints.

AT&T concedes that "if barriers to entry and expansion are low in Massachusetts, Verizon would not be endowed with monopoly power."[1] This Department's competition-enabling policies have ensured that barriers to entry are nonexistent and that local competition is thriving and sustainable. As explained in its Initial Brief, Verizon MA provided overwhelming evidence of competition, both statewide and on a wire-center-by-wire-center basis. CLECs seeking to serve Massachusetts customers can use Verizon MA's resold services, unbundled network elements ("UNEs") or UNE-Ps or, like AT&T Broadband, can invest in their own networks. Since Verizon MA has no monopoly power, there is every reason to conclude that effective competition is widespread and market-based prices are appropriate.

[1] AT&T Initial Brief, at 41.

Unable to refute the pervasive evidence that local competition is present and is growing at stunning rates, AT&T and the Attorney General attempt two diversions to distract the Department's attention from an analysis of the competitive market. First, AT&T and the Attorney General attempt to change the focus of the Department's inquiry into a discussion of special access provisioning and pricing, and the Department's audit of the Performance Assurance Plan (or "PAP").[2] Second, AT&T and the Attorney General continue their quest to have the Department mechanically apply "market power tests" that ignore both reality and Department precedent. These efforts to misdirect the Department's inquiry or to depart from well established precedents should be rejected.

I. THE MASSACHUSETTS LOCAL EXCHANGE MARKET IS IRREVERSIBLY OPEN TO COMPETITION AND SUFFICIENTLY COMPETITIVE.

A. AT&T and the Attorney General Cannot Refute the Fact that Effective Competition is Present Throughout the State and Growing at Dramatic Rates.

Verizon MA presented extensive data that meet the Department's standards to demonstrate sufficient competition. That evidence included information on the presence of numerous competitors, the vulnerability of the incumbent's market share, the widespread availability of capacity in the form of unbundled loops, switching and transport through ubiquitous collocation, and the presence of effective facilities based competitors with their own

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[2] The New England Public Communications Council ("NEPCC") filed a 1 1/2 page brief claiming that no competition exists for public access line ("PAL") service and requesting, in essence, that market-based pricing for PAL service be subject to 47 U.S.C. § 276 and relevant implementing orders of the Federal Communications Commission ("FCC"). NEPCC's claim that PAL service is not competitive is contradicted by the record in this case, which shows that Verizon MA's PAL and PASL services are available for resale at a discount; that several resellers currently offer PAL and PASL service; and that facility based CLECs offer payphone services (Exh. NEPCC-VZ 2-5, Exh. NEPCC-VZ 2-6 and Exh. ATT-VZ 1-2). As Dr Taylor states: "Insofar as there are no substantive barriers to entry, any CLEC (on the list or not) could, in the event price exceeded the competitive level, enter and supply a competitive alternative to Verizon MA's PAL or PASL services in Massachusetts" (Exh. NEPCC-VZ 2-2).

networks (*see* Verizon MA Initial Brief, at 3-7). AT&T and the Attorney General provide no cause for the Department to ignore this extensive evidence that tracks the type of evidence required in similar past proceedings. Rather, AT&T attempts to undercut this overwhelming evidence with unsupported assertions[3] that fail to refute any of the facts Verizon MA placed in evidence.[4] The Attorney General, in turn, asserts that there is not "sufficient competition" to permit the pricing flexibility Verizon MA has sought, nor "sufficient competition" to allow the Department to depart from a cost of service or indexed price regulation (Attorney General Initial Brief, at 10).[5] The Attorney General is simply wrong.

A comparison of the Initial and Updated Massachusetts Competitive Profiles demonstrates that the evidence of sustainable and growing competitive entry is compelling.[6] For example, as detailed in Table 1 of the Verizon MA Initial Brief, lines served by competitors from January to December 2001 grew from 851,000 to 1,113,600. During that period, the number of CLEC-switched lines increased from 554,700 to 841,200. In the most densely populated areas of

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[3] For example, AT&T asserts that Verizon MA has presented only "putative" evidence of retail competition (AT&T Initial Brief, at 1), that is not "validated" or is "unreliable" (*id.*, at 19). AT&T also claims that Verizon MA's "purported showing of sufficient retail competition fails because Verizon has not demonstrated that its retail competitors can obtain the necessary inputs at the same cost and provisioning performance that Verizon can obtain them" (*id.*, at 17).

[4] For example, AT&T claims that Verizon MA has "not analyzed in any way the data in the Profile" and "utterly failed" to prove the presence of effective competition (AT&T Initial Brief, at 42), but apparently recognizing that reasonable minds might disagree with AT&T's inaccurate characterizations, AT&T later describes the Profile data as evidence of "tentative competition" (AT&T Initial Brief, at 46). Of course, since AT&T's own broadband service company is one of the most effective competitors in the state, its attacks on Verizon MA's proof are disingenuous at best.

[5] The Attorney General devotes approximately half of the argument section of his Initial Brief to the contention that Verizon MA has "too much" market share or that supply elasticity remains "too low" to allow pricing flexibility – with little or no record evidence to support his claims. The other half of his argument is devoted to the assertion that the Department does not have enough evidence to judge the PAP because the PAP audit is not complete (Attorney General Initial Brief, at 21-27).

[6] *See, generally,* Exh. VZ-3A, Attachment 1 and Exh. DTE-VZ RR2, Attachment 1. Tables 1-5, referenced on pages 13-15 of the Verizon MA Initial Brief, were compiled from the Initial and Updated Massachusetts Competitive Profiles.

the Commonwealth, CLECs have captured almost [PROPRIETARY] of the market (*see* Table 3).[7] The pace at which CLECs are exercising the full range of competitive entry options is extraordinary (Exh. VZ-2, at 7-8).[8] At the same time, Verizon MA retail lines declined from 4.324 million to 4.157 million.

Resale competition is extensive throughout Massachusetts. Statewide, the number of business lines served by resellers equals 13 percent of the total number of business lines now served by Verizon MA (*see* Table 1). In some smaller central offices, the total reseller business line count equals 30 percent of the number of business lines served by Verizon MA (Exh. VZ-1, at 9-10). Stated simply, the number of competitors is significant, and the lines they serve are growing at a rapid pace.[9]

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[7] As explained in Verizon MA's Initial Brief, on a statewide basis, more than 20 percent of customers, approximately 1.1 million lines, are served by a carrier other than Verizon MA. Competitors now serve [PROPRIETARY] of all lines in rural areas, [PROPRIETARY] in suburban areas, [PROPRIETARY] in urban areas and [PROPRIETARY] in metropolitan Boston. For the business market, the numbers are even higher. CLECs serve [PROPRIETARY] of the business lines in rural Massachusetts (which represents [PROPRIETARY] of business lines statewide), [PROPRIETARY] of the business lines in the suburban market, and [PROPRIETARY] and [PROPRIETARY] of the urban and Boston metropolitan business lines, respectively. *See* Verizon MA Initial Brief, at 15.

[8] *See, e.g.,* Verizon MA Initial Brief, at 15-18 for a discussion of CLEC-switched line growth, total number of local switches, UNEs and UNE-Ps from January through December 2001.

[9] The Attorney General acknowledges that an "indicator of supply elasticity can come through resale competition" (Attorney General Initial Brief, at 17). He then argues, however, that resellers have a "minimal impact" on the level of competition because "resale rates are tied to Verizon's retail rates and, unlike the situation present in DPU 91-79, Verizon controls the 'bottleneck' over wholesale markets" (Attorney General Initial Brief, at 18). The Attorney General is wrong. Verizon MA can no more "control" the avoided cost discount than it can ignore Telecom Act requirements imposed by the FCC and the Department. Moreover, competitive losses to resellers represent a meaningful force to discipline the market for related services, contrary to AT&T's position that only full facilities based or UNE competition suffices (*see* AT&T Initial Brief, at 16-17). Indeed, AT&T witness Dr. Mayo argued in D.P.U. 94-185-C that there is *no* reason to discount the effect of non facilities-based competitors. As he explained:

> The ability of these firms to purchase tariffed services from other firms and to resell these services to final consumers is merely an indication that separate wholesale and retail segments exist in this industry. Some firms (the facilities-based carriers) are vertically integrated across both segments, while other firms (resellers) are not. Competition between vertically integrated and non-vertically integrated firms, however, occurs frequently in the U. S. economy.

(footnote continued…)

AT&T argues that Verizon MA must demonstrate "not only that the door is open and will remain open, but that competitors have entered and will continue to enter and will be able to compete without harassment or sabotage by Verizon" (AT&T Initial Brief, at 14). Although AT&T sets a constantly-shifting threshold that Verizon MA can never meet, that is not the standard required by this Department. The record establishes that competitors are successfully relying both on inputs from Verizon MA and on their own networks to compete (*see* Verizon MA Initial Brief, at 13-19). Despite significant competitive inroads in just five short years since the passage of the Telecommunications Act of 1996 ("Telecom Act")[10], AT&T claims that the record demonstrates "the bare existence" (AT&T Initial Brief, at 15) of certain types of competitive entry. This assertion is baseless. What the evidence shows is that entry barriers in Massachusetts are sufficiently low to discipline Verizon MA's pricing decisions and that various entry methods are successful (Verizon Initial Brief, at 8-11).[11]

AT&T claims that Verizon MA provided "no evidence" of full facilities-based competition (AT&T Initial Brief, at 17). Once again, AT&T is wrong – and in light of its own AT&T Broadband investment, its assertion lacks credibility. As explained in Verizon MA's

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(…footnote continued)

See Exh. VZ-4, at 23, *citing* Mayo Direct at 29. Underscoring the importance of resale, the Department also concluded that retail price floor requirements were satisfied with Verizon MA's filing of wholesale tariffs to provide resold services. *See* D.P.U. 94-185-C (1997); s*ee also* Exh. VZ-4, at 22 and Exh. DTE-VZ 2-12.

10 Pub. L. No. 104, 110 Stat. 56 (1996).

11 Emphasizing that Verizon MA must demonstrate "actual" competition "that is capable of bringing to bear competitive discipline on the retail aspects of Verizon MA's provision of telecommunications services" (AT&T Initial Brief, at 16, 13 and 23), AT&T ignores the role of *potential* competition which AT&T witness Dr. Mayo admitted was relevant to any market power analysis. Dr. Mayo observed that "uncommitted entrants," for example, must be considered as part of the market for purposes of any market power analysis based on the U. S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, "even when they do not currently sell services in the relevant market" (Tr. 4, at 713-14). Verizon MA established in testimony and at hearing that actual and potential retail competition is alive and well.

Initial Brief, competitors have deployed at least 48 local switches that can serve customers within a wide radius of the serving switch (Verizon MA Initial Brief, at 16). Strong facilities-based competitors in Massachusetts include AT&T, RCN and WorldCom (Exh. VZ-1, at 11).[12] Facilities-based competitors also have constructed extensive fiber networks, including SONET Rings, in major business centers and industrial parks (Exh. VZ-1, at 14; *see also* Verizon MA Initial Brief, at 16-17). Moreover, given the availability of UNEs at affordable prices, full facilities based competition represents only one means of establishing effective competition. As Dr. Taylor explained, "competition is now practical for any service in any geographic area of Massachusetts where a competitor can supply any portion of the facility or service as efficiently as Verizon" (Exh. VZ-2, at 5).[13]

AT&T further complains that the "count of retail providers" contained in the Massachusetts Competitive Profiles has "not been verified against any real world offerings" (AT&T Initial Brief, at 19). Much like Attorney General witness Selwyn's "admittedly anecdotal" experience in obtaining a T-1 line (Verizon MA Initial Brief, at 28, n. 30), AT&T's "cursory check" of CLEC offerings is similarly unreliable.[14] The Initial and Updated Massachusetts Competitive Profiles contain a summary of services provided by each active

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12 Indeed, AT&T Broadband recently announced a $460 million upgrade to its New England network. Peter Howe, *AT&T Aims to Complete Boston Upgrades in '02*, Boston Globe, February 11, 2002, at C1.

13 In fact, AT&T misleadingly suggests that Verizon MA admitted "full" facilities based competition is the "most potent" form of entry, citing Dr. Taylor's prefiled testimony (*see* AT&T Initial Brief, at 17). The hearing transcript confirms, however, that Dr. Taylor was referring to facilities-based (rather than *full*) competition (Tr. 2, at 188-89). Moreover, the 554,550 lines referenced in Exh. VZ-2 and discussed at the hearings (*id*.) included CLEC-switched lines (*see* Verizon MA Initial Brief, Table 1, at 13).

14 The three CLECs listed in Dr. Mayo's "simple telephone check" (Exh. ATT-2, at 15-16) were Sprint, Focal and Business LD. Dr. Mayo's conclusion is not supported by actual service records or the Massachusetts Competitive Profiles (Exh. VZ-3A, Attachment 1 and Exh. DTE-VZ RR2, Attachment 1). Business LD is a reseller and in May 2001 had a small number of lines installed in Newton. Focal is a facility based provider and had entered its own listings in the E911 database for customers in Newton. Lastly, the Profile

(footnote continued…)

competitor operating in the Commonwealth. The source documents used to prepare the summaries were obtained from the competitors' filed tariffs and from information available on individual competitors' Internet websites.[15] The Department should demand more than a "cursory check" to refute the detailed analyses and data contained in the Initial and Updated Massachusetts Competitive Profiles. AT&T had the resources and access to data to prepare a thorough comparison with Verizon MA's Competitive Profiles if it chose to do so. Instead, AT&T relied on a "cursory check" in an attempt to undermine the facts presented in the Massachusetts Competitive Profiles. That attempt, based not on facts or research or expert analysis, should be rejected.

B. AT&T's and the Attorney General's Reliance on Mechanical Applications of Theoretical Models is Contrary to Department Precedent and Should be Rejected.

AT&T complains that Verizon MA did not provide the Department a "means of analyzing the enormous amounts of data" provided in support of its petition (AT&T Initial Brief, at 42). This is not true. The Department determined in D.P.U. 1731 (1985) that reliance on an index or other "mathematical" model to determine the level of competition was a fruitless exercise: "[I]ndeed, we believe it is impossible to devise such an index that would be based on readily available, timely data. Rather, we agree with [the witness] that such matters are inherently judgmental" (*id.*, at 18).

(…footnote continued)

listed Sprint as a collocator in Newton. Nowhere in the Profiles or in testimony did Verizon MA represent that Sprint was providing business dial tone service in Newton (*see generally, id.*).

[15] *See* the Introduction to the Massachusetts Competitive Profiles for an explanation of the manner in which the Profiles were compiled.

The Department has long recognized that its determination of whether a market is "sufficiently competitive" requires the consideration of a range of factors, including the structure of the market, the ease of competitive entry, the number of competitors, the presence of actual competitive activity and the extent of competitive losses suffered by the incumbent (*see*, Verizon MA Initial Brief, at 2-5). AT&T and the Attorney General cannot refute Verizon MA's evidence. Not surprisingly, therefore, they seek to convince the Department that formal market power studies of "both product and geographic dimensions" must be undertaken in the hope that such studies will both delay and detract from the obvious (AT&T Initial Brief, at 39 and Attorney General Initial Brief, at 4-8).[16]

While describing certain of Mr. Doane's and Dr. Taylor's expert opinions as "the typical economist arguments" (AT&T Initial Brief, at 49), AT&T purports to embrace "standard economic analysis" in support of the proposition that the Department should undertake extensive analysis to prove that which Verizon MA has already demonstrated, that is, that the Massachusetts local telecommunications market is competitive. AT&T suggests an elaborate process in which the Department would first, identify "the relevant economic market or markets within which the firm provides service" (AT&T Initial Brief, at 39) and next, undertake a formal market power study that considers market share, supply elasticity of fringe firms and market-

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[16] For example, the Attorney General proposes in his Initial Brief that "the Department should conduct separate reviews of the business and residential markets under the three-pronged sufficient competition test – *i.e.,* whether there is sufficient actual competition in each relevant market such that competitors will exert enough pricing pressures to create just and reasonable prices for consumers" (Attorney General Initial Brief, at 8). Following this suggestion would require 18,000 different market-share studies that would take years to complete (Exh. VZ-4, at 3 and Exh. VZ-5A, at 6). AT&T now seeks to distance itself from this suggestion when it states in its Initial Brief (AT&T Initial Brief, at 40), "Verizon contends that the testimony offered by Dr. Mayo and Dr. Selwyn required that the relevant geographic market be defined at the individual wire center basis in Massachusetts. This interpretation of the testimony is simply incorrect." However, the Attorney General's Initial Brief – and the AT&T and Attorney General testimony upon which it is based – reiterates the extent of the studies requested.

demand elasticity (AT&T Initial Brief, at 40-41). The Attorney General supports this suggestion (Attorney General Initial Brief, at 5).[17]

However, AT&T witness Dr. Mayo relied on far less mechanical applications of economics in supporting AT&T's market pricing requests in D.P.U. 91-79. Dr. Mayo observed that market-share data often lead to "specious conclusions." (Exh. VZ-4, at 7-8, *citing* D.P.U. 91-79, Mayo Direct, at 15-16). At that time, Dr. Mayo stated that the Department should focus its attention not on theoretical market-share studies, but rather on barriers to entry. As Dr. Mayo explained, the "issue of entry barriers is perhaps the most important qualitative factor, *for if entry barriers are very low it is unlikely that market power, whether individually or collectively exercised, will persist for long"* (*see id.*, emphasis added).[18] Coupled with Dr. Mayo's admission on cross examination in this proceeding ("[r]egulation may really attenuate any inferences that can be garnered from a simple examination of market share")[19] and AT&T's

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[17] The Attorney General cited the record incorrectly in attempting to support his proposition. After defining demand elasticity as "a customer's willingness and/or ability to modify the quantity of a good or service purchased *from a given firm* in response to a change in that firm's price" (Attorney General Initial Brief, at 5, emphasis added), the Attorney General then stated that the relevant demand elasticity was low, citing Dr. Taylor's testimony (Attorney General Initial Brief, at 19) ("In fact, Dr. Taylor clearly states, 'I don't think Verizon has put a market-demand elasticity on the record, but I think we know for basic exchange service that it's probably pretty low.'"). The Attorney General confuses *market* demand elasticity with *individual firm* demand elasticity. Dr. Taylor testified to the former (Tr. 3, at 472), as the remainder of his quotation reveals: "That is, basic exchange elasticities are far less than one because they're aren't all that many substitutes – there are substitutes, but they're not all that many for a basic exchange line. There's first-class mail, but that's hardly a good substitute" (*id.*). The Attorney General's conclusion, that Verizon MA does not face demand elasticity for *its* services, does not follow logically from Dr. Taylor's testimony regarding market-demand elasticity. The remainder of the Attorney General's claims – that Verizon MA "benefits from its poor provisioning of services" because the "demand elasticity for telephone services remains low" – collapses of its own weight (Attorney General Initial Brief, at 19).

[18] Not surprisingly, AT&T seeks to distinguish the Department's ruling and Dr. Mayo's reliance on the same type of evidence that Verizon MA presented in the current proceeding. AT&T complains that Verizon MA still maintains "bottleneck control" over the wholesale market, unlike AT&T in the "non-dominant" proceeding. What AT&T ignores, however, is that Verizon MA's wholesale services are subject to comprehensive regulation resulting from Department and FCC implementation of Telecom Act policies. The Department's PAP is one such example (AT&T Initial Brief, at 10).

[19] Tr. 4, at 670. The Attorney General also observed, while reaching the wrong conclusion, that "an 80%-90% market share alone may not suffice to prove that Verizon holds enough market power to raise prices

(footnote continued…)

admission in its Initial Brief ("if barriers to entry and expansion are low in Massachusetts, Verizon would not be endowed with monopoly power"),[20] it is clear that no detailed market study analysis is necessary or worthwhile. Rather, the information already on the record demonstrates that there is sufficient competition under the Department's precedents.

Finally, AT&T contends that the Department "cannot be assured" that Verizon MA's proposed market-based rates are just and reasonable without determining first whether Verizon MA is producing "excess profits" and whether "non-competitive services are subsidizing competitive ones" (AT&T Initial Brief, at 13). This assertion is equally without merit. In this proceeding, the Department has held previously that a finding of sufficient competition would make *irrelevant* the need for traditional cost-of-service and earnings regulation. *Interlocutory Order on Scope*, at 17, n. 8 (June 21, 2001) (emphasis added) ("if the Department determines that Verizon has demonstrated sufficient competition, then an evaluation by other parties of Verizon's cost-of-service and earnings would be irrelevant"). The statutory requirement in G.L. c. 159, §14 that rates be "just and reasonable" is met by a Department finding of sufficient competition (*AT&T*, D.P.U. 91-79, at 34 (1992)), as the Department precisely determined in approving market-based rates for AT&T's Category M services. The Department has also held that just and reasonable rates are enhanced by a competitive market, which "encourage[s] greater levels of economic efficiency and fairness than does a regulated monopoly environment." *See*

(…footnote continued)

over a sustained period without experiencing a significant drop in revenues" (Attorney General Initial Brief, at 10).

[20] AT&T Initial Brief, at 41. Access to UNEs and resale provides competitive providers with entry paths that allow them to avoid incurring the sunk costs of building their own local facilities (Exh. VZ-5A, at n. 4), thus making an elaborate market power analysis unnecessary (Exh. VZ-5A, at 7).

North American TelCom, Inc., D.P.U. 92-174, at 2 (1994), *citing First Phone, Inc.*, D.P.U. 1581 (1984); *U.S. Telephone, Inc.*, D.P.U. 85-46 (1985); D.P.U. 1731, at 26 (1985).

AT&T's stated concern over the potential for unlawful cross subsidization is similarly inapposite (AT&T Initial Brief, at 12, *citing New England Telephone and Telegraph Company v. Department of Public Utilities*, 372 Mass. 678 (1977) ("*NET*")). In *NET*, the Court upheld the Department's rejection of a two-tiered rate structure for Dimension PBX services, concluding that rates under the proposed plan could result in short-term revenue deficiencies that could be recouped improperly from non-competitive service categories. *NET*, at 684-685. In this case, Verizon MA has demonstrated that the local exchange market is open and sufficiently competitive. No comparable finding was made by the Department in *NET*. Equally important, no regulatory vehicle is available for Verizon MA to recoup the "revenue deficiencies." If deemed sufficiently competitive, business and residence rates would be market-based, and wholly independent of traditional rate-of-return regulation. The evidence fully satisfies the Department's statutory mandate of just and reasonable rates.[21]

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[21] AT&T's criticisms of Commissioner Vasington's proposal are similarly ill-founded (AT&T Initial Brief, at 44-46). First, its objection that competition in metropolitan and urban density zones is "inefficient" because allegedly based on "above cost access services" is belied by the findings of the FCC that competitive conditions in the areas served by Verizon-MA warranted application of both "Phase I" and "Phase II" pricing flexibility (Tr. 3, at 564-565), discussed *infra*. Second, AT&T's claim that "whatever distortion is present in urban areas is permitted under such a price cap to be doubled" is entirely incorrect. Economists measure a distortion in price by the Lerner Index (*see, e.g.*, W.K. Viscusi, J. M. Vernon and J.E. Harrington, Jr., *Economics of Regulation and Antitrust* (2d ed.), Cambridge: MIT Press (1995) at 266-67), which is determined by the ratio of the markup of price over cost to price. AT&T assumes that prices in the urban area reflect market power, so that if cost were X, price in the urban area would be given by (1+y)X, where y is the mark up above cost. According to AT&T, costs in the rural area would be assumed to be 2X and the proposed price cap in the rural area would be given by 2(1+y)X. Simple algebra shows that the possible distortion in price in the rural area, [2(1+y)X – 2X] / 2(1+y)X, is precisely the same as the assumed distortion in the urban area: [(1+y)X – X] / (1+y)X.

C. The Use of E-911 Data to Estimate the Number of Lines Served by Facilities-Based Competitors Is Reasonable and Supports Verizon MA's Showing of Sufficient Competition.

One part of the evidence Verizon MA relied upon to demonstrate the extent of competition in Massachusetts was the information contained in the E-911 database. AT&T argues that the conclusions drawn from that database are wrong because of AT&T's E-911 reporting practices and allegedly "unverified" information concerning other CLECs' reporting practices.[22] AT&T's argument misses the mark.

First, Verizon MA used the E-911 database estimates to demonstrate that entry barriers are low (as evidenced by the significant level of phone numbers in use by competitors), that facilities-based competition is a significant component of the overall competition, and that competitive lines are growing rapidly (Verizon MA Initial Brief, at 24). Verizon MA's estimates are reasonable even if there are some minor differences in the manner in which CLECs provide information for the E-911 database. Further, even adjusting for AT&T's analysis of its own database entries, the evidence overwhelmingly supports the uses for which it was introduced.[23]

The Attorney General acknowledges that, contrary to AT&T's view, "the Profile represents a rough approximation of the level of local competition, separates that local market share between business and residential, and distinguishes the source of competition among resale, UNE-P and facilities-based CLEC competition" (Attorney General Initial Brief, at 11,

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[22] AT&T Initial Brief, at 22, *citing Service Employees Intern. Union, Local 509 v. Labor Relations Comm'n*, 410 Mass. 141 (1991) ("*Service Employees*").

[23] AT&T's reliance on *Service Employees* is misplaced (AT&T Initial Brief, at 22). In that case, the Court remanded a decision of the Massachusetts Labor Relations Commission because the Commission made an assumption without substantial evidence. *Service Employees*, at 148. In this proceeding, Verizon MA's initial assumption concerning AT&T's E-911 reporting practices was adjusted to reflect AT&T's testimony. Nevertheless, as discussed above, Verizon MA demonstrated that AT&T's E-911 reporting practices would not affect the relevant conclusions that can be drawn from the E-911 data concerning the overall level of retail competition (Verizon MA Initial Brief, at 24-26).

n. 10). These are the purposes for which the information was compiled and presented as evidence. Verizon MA concurs with the opinion of the Attorney General on this matter.

Second, Verizon MA directly addressed AT&T's E-911 practices and demonstrated that AT&T's method of reporting "ported numbers behind a PBX" made no material difference in Verizon MA's estimate of competitive lines (Verizon MA Initial Brief, at 24-26). AT&T's ported figures represent only a small portion of their overall lines in the profile (Exh. VZ-8, at 4). Nor did AT&T witness Ms. Waldbaum's modification at hearing have any material effect on the conclusion that the vast majority of AT&T business listings use telephone numbers that have been "assigned" to AT&T (Verizon MA Initial Brief, at 24-25, n. 27).

Third, it is very likely that the total number of AT&T E-911 listings understates the number of lines actually served by AT&T. Some of the E-911 listings are for PBX services, for which only a main number is included in the E-911 database. That means that all other lines served by AT&T off of that PBX will not be recorded in the E-911 database, thus understating the total number of lines served. This would similarly be true of any other CLEC providing services to a business customer using a PBX for which only the main line is included in the E-911 database.

In a final effort to refute the overwhelming evidence of sufficient competition, AT&T asserts that Verizon MA had an obligation to prove that CLECs are "actually offering" the services in their tariffs and that they are available to serve new customers, as required of a carrier (AT&T Initial Brief, at 23). These arguments should be given little weight. Whether Verizon MA is required to demonstrate "actual" or "potential" competition, it has more than adequately

demonstrated *both.*[24] AT&T's constantly shifting burden argument becomes meaningless when it attempts to raise the bar by claiming that serving existing customers is insufficient to establish competition. Indeed, AT&T wants the Department to require Verizon MA to demonstrate a competitor's state of mind or willingness to provide new service as well as current services (*id.*, at 23-24).

The record demonstrates that Verizon MA's estimates are conservative depictions of the level of competition in Massachusetts (*see* Verizon MA Initial Brief, at 24-26). The Initial and Updated Massachusetts Competitive Profiles support the conclusion that barriers to entry and expansion are low (or non-existent) and that AT&T itself is serving customers in every exchange in Massachusetts. AT&T chose not to provide its own data but rather to attempt to discredit Verizon MA's estimates. Having failed to refute Verizon MA's evidence, its continued arguments seeking yet more "proof" of competition should be ignored.

D. Competition Is Present and Sustainable.

In the face of evidence demonstrating that competitors serve almost [PROPRIETARY] of the lines in densely populated communities, AT&T nonetheless sounds the alarm that declines in CLEC capitalization augur a "death spiral" for competitors in Massachusetts (AT&T Initial Brief, at 46-49). The Attorney General also claims that the "capital markets are disappearing for the CLECs" (Attorney General Initial Brief, at 17). The record shows, however, that competition in Massachusetts is growing at a rapid rate, despite declining market capitalizations that have affected all telecommunications carriers. In 2001, for example, when market capitalization

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[24] It is difficult to know what standard AT&T would have the Department apply. For example, at one point it appears to argue that potential competition alone is not sufficient, when it complains that Verizon MA's list of CLECs offering service in particular exchanges "did not identify which CLECs are actually offering the business services" (AT&T Initial Brief, at 23).

declined for the telecommunications industry as a whole, the level of competitive activity in Massachusetts increased substantially (Verizon MA Initial Brief, at 11-18).

As noted in Verizon MA's Initial Brief, CLECs are not simply using Verizon MA inputs to serve their customers but have invested large sums in competing facilities (Exh. VZ-1, at 11). Cable operators, such as AT&T Broadband and RCN, provide the equivalent of local loops, dial tone, switching for local and long-distance calling, vertical features and internet access entirely over their own facilities (Exh. VZ-1, at 12; Exh. VZ-2, at 10). The presence of strong competitors with in-place capacity, utilizing significant fiber and wireless networks, forcefully supports a Department finding that competition is both present and sustainable.

Moreover, as Dr. Taylor testified, the failure of individual businesses is a normal part of the competitive process (Exh. VZ-4, at 16). AT&T witness Mr. Fea confirmed that redeploying the assets of exiting carriers is not, as AT&T now claims, a "speculative" opportunity, but rather one which more successful companies are ready and eager to undertake (Tr. 4, at 609).[25] In fact, AT&T's president has declared such opportunities to be "attractive" (Tr. 3, at 561): "We think there's a great opportunity for AT&T to be an acquiror [sic] of assets in this reconsolidation period that we're going through on a very attractive basis and very opportunistically substituting for capital spending that we ordinarily would have already made" (*id.*). In talking to regulators, AT&T describes a "pessimistic picture" (AT&T Initial Brief, at 46); however, in talking to Wall Street, AT&T's chief executive views the same facts "very opportunistically." Having competed

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[25] Mr. Fea also explained that the process of "upgrading" plant used for one purpose to provide another type of service bears little resemblance to the difficult picture AT&T paints in its Initial Brief (Verizon MA Initial Brief, at 9, n. 11).

and won a large proportion of the market in Massachusetts, CLEC competition – whether from one particular carrier or its successor – is here to stay.

II. COMPLAINTS ABOUT SPECIAL ACCESS SERVICES AND THE PERFORMANCE ASSURANCE PLAN DO NOT DIMINISH THE FACT THAT COMPETITION IN MASSACHUSETTS IS ROBUST.

Having failed to refute Verizon MA's overwhelming proof of sufficient competition, AT&T and the Attorney General expend considerable effort rehashing their arguments regarding special access. These parties again argue that special access pricing and provisioning must be resolved either in this proceeding or before the Department grants Verizon MA market-based pricing (AT&T Initial Brief, at 25-29; Attorney General Initial Brief, at 22). Without regard to whether there are problems with special access or with the PAP, which there are not, the attempt to put those matters at issue in this case is without merit.

In its *Interlocutory Order on Verizon's Motion to Strike, or in the Alternative, to Supplement Surrebuttal* (December 13, 2001), the Department sought comments on the competitive effects of provisioning problems that followed a cycle of noncompliance/investigation/correction, which is the model used by the Department to police Verizon MA's wholesale performance. The Department expressly ruled that it was *not* interested in evidence on Verizon MA's provisioning compliance or noncompliance, but rather on the effects such a provisioning cycle could have on the market. Rejecting the very arguments that AT&T and the Attorney General reiterate in their Initial Briefs, the Department explained that:

> [W]e agree with Verizon that special access provisioning, and indeed Verizon's provisioning of wholesale facilities in its entirety, is outside the scope of this case. In terms of Verizon's provisioning of facilities that are essential for its retail competitors (facilities that include interconnection, UNEs, resale, switched access, and special access), Verizon either provisions such facilities on a reasonable, non-discriminatory basis, or it does not….Therefore, Verizon is correct in noting that with respect to

> special access that "any possible negative impact on competition that could result from Verizon MA's provisioning of special access services will be resolved in other proceedings" (VZ Motion to Strike, at 3), and therefore we agree that there is no need to duplicate or incorporate our investigation in this case, as AT&T suggests.

Interlocutory Order, at 5-6.

The Attorney General also expresses concern that the Performance Assurance Plan "may prove inadequate to promote competition" because of the relatively small monthly penalties incurred to date (Attorney General Initial Brief, at 24-25). Contrary to the Attorney General's assertion, the "minimal" penalty payments from January through October 2001 simply reflect the high quality of Verizon MA's wholesale services and underscore the positive effect on service quality that the PAP engenders.[26]

AT&T's complaint that the Department's approval of the PAP "is not adequate for ensuring UNE provisioning parity *for the purposes of this case*" (AT&T Initial Brief, at 36, emphasis in original) is also misplaced. Both the Department and the FCC have found that the PAP provides Verizon MA with meaningful economic incentives to ensure that it continues to provide quality wholesale services (Verizon MA Initial Brief, at 27, *citing Evaluation of the Massachusetts Department of Telecommunications and Energy*, CC Docket No. 00-176, at 412 (October 16, 2000); *Application of Verizon New England for Section 271 Authority*, Memorandum and Order, CC Docket No. 01-90, at ¶¶ 240-247 (April 16, 2001)).[27] As the FCC

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[26] The Attorney General's analysis is a true "heads I win, tails you lose" argument: if Verizon MA had paid substantial penalties, it undoubtedly would have been attacked for poor performance; since it paid only minimal penalties, it is attacked for providing *good* performance. Unlike the Attorney General, Verizon MA will be most satisfied when it pays no penalties at all because of the high quality of its wholesale performance.

[27] Verizon MA is also subject to a performance plan and penalties under the Department's *Consolidated Arbitrations.*

found: "Verizon's Performance Assurance Plan (or PAP) for Massachusetts provides additional assurance that the local market will remain open after Verizon receives section 271 authorization." *Application of Verizon New England for Section 271 Authority,* Memorandum and Order CC Docket No. 01-90, at ¶ 236 (April 16, 2001). Moreover, the FCC specifically noted that "the Massachusetts Department established a PAP that discourages anti-competitive behavior by setting the damages and penalties at a level above the simple cost of doing business" (*id.,* at ¶ 240). [28]

AT&T is also mistaken in claiming that "there is no basis for concluding that provisioning parity exists today and indeed the evidence shows that it does not" (AT&T Initial Brief, at 35). Verizon MA's actual performance in providing service to wholesale customers has been excellent (*see* Exh. AG-3 through Exh. AG-9). Under the PAP, Verizon MA's performance is assessed on approximately 190 separate metrics.[29] The data set forth in Table 1 below demonstrate that Verizon MA's performance has been strong and is indeed improving.[30]

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[28] The FCC also underscored the fact that, in addition to the $155 million at stake under the PAP, "Verizon faces other consequences if it fails to sustain a high level of service to competing carriers, including: federal enforcement action pursuant to section 271(d)(6) and remedies associated with antitrust and other legal actions." *Application of Verizon New England for Section 271 Authority,* Memorandum and Order, CC Docket No. 01-90, at ¶ 236 (April 16, 2001). Also contrary to AT&T's complaint that the Department "does not have evidence upon which it can conclude" that the PAP will deter anti-discriminatory conduct, the FCC highlighted the PAP's additional features, such as performance measurements and standards, structure, self-executing enforcement, data validation and audit procedures, and accounting requirements (*id.,* ¶¶ 243-248).

[29] The PAP contains approximately 190 separate metrics for evaluating Verizon MA's wholesale performance (*see* Exh. AG-3 through Exh. AG-9*)*. If there is no activity in a given month for a particular metric, that metric is not included in the PAP calculation. The actual number of metrics evaluated in any given month is, therefore, usually fewer than 190.

[30] As noted in its Initial Brief, at 28, n. 31, on January 25, 2002, Verizon MA filed with the Department the final PAP results for October 2001. On February 25, 2002, Verizon MA filed with the Department the preliminary PAP results for January 2002 and final results for November 2001. The December and January credits exhibited in the Table are preliminary results.

Table 1: *Summary of Wholesale Performance Assurance Plan Results*										
	April 01	**May 01**	**June 01**	**July 01**	**Aug. 01**	**Sep. 01**	**Oct. 01**	**Nov. 01**	**Dec. 01**	**Jan. 02**
% of Metrics Meeting or Exceeding Standard	89.6%	90.0%	90.7%	90.9%	87.3%	89.3%	90.8%	90.6%	90.7%	93.1%
# of Metrics Met	146	153	156	149	144	151	157	155	156	163
# of Metrics Scored –2	15	14	11	11	15	13	13	5	5	7
# of Metrics Scored –1	2	3	5	4	6	5	3	5	11	5
Total Credits[31]	$1,247,953	$709,923	$794,605	$63,617	$695,423	$669,789	$105,914	$57,567	$86,536	$0

Verizon MA's performance has been excellent in all categories. Verizon MA has met or exceeded the established performance standards approximately 90 percent of the time. The evidence shows that the PAP is proving to be the self-correcting mechanism envisioned by the Department and the FCC.[32]

AT&T's claims concerning special access services similarly miss the mark (Verizon MA Initial Brief, at 29-30). First, the Massachusetts special access market is competitive. Specifically, the Federal Communications Commission has granted Verizon MA both "Phase I" and "Phase II" pricing flexibility (Tr. 3, at 564-65; *see also* Exh. VZ-6, at 5-8). No party presented data in this case to support the proposition that the FCC's determination is wrong.

Second, AT&T's suggestion that because special access prices are higher than UNE rates CLECs are at a competitive disadvantage (AT&T Initial Brief, at 26-28) is unsupported in the

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[31] Bill credits for June exhibited in Table 1 above do not include the quarterly assessment of the Special Provision for Flow-Through that resulted in credit of $1.32 million.

[32] AT&T's reliance on case law to suggest the lack of substantial evidence for the effectiveness of the PAP is also misplaced (AT&T Initial Brief, at 37). The Supreme Judicial Court, in a recent decision involving the Department, upheld the Department's primary role in making such factual determinations and the relevant inferences that can be made therefrom.

> Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6). We defer to an agency on questions of fact and the reasonable inferences that can be drawn therefrom. See *Massachusetts Mun. Wholesale Elec. Co. v. Energy Facilities Siting Council*, 411 Mass. 183, 199, 580 N.E. 2d 1028 (1991).

Town of Hingham v. Department of Telecommunications and Energy, 433 Mass. 198, 210 (2001).

record (Verizon MA Initial Brief, at 29-30). The fact that the Massachusetts special access market is competitive means that CLECs are not placed at a competitive disadvantage regardless of Verizon MA's special access prices: if Verizon MA's prices are too high, CLECs can purchase services from alternate suppliers. Further, theory aside, the proof is in the facts: the Initial and Updated Massachusetts Competitive Profiles provide clear evidence of intense competition, contradicting AT&T's contention.

Finally, AT&T's dispute over the requirements associated with converting existing special access arrangements into UNEs rests with the Federal Communications Commission (AT&T Initial Brief, at 29-32).[33] AT&T's special access argument is inappropriate – and indeed irrelevant – to this proceeding. AT&T's inability to satisfy the FCC's specific requirements hardly provides cause for the Department to conclude that there is an absence of effective competition in any Massachusetts market (Verizon MA Initial Brief, at 30).

III. CONCLUSION

The evidence that the Massachusetts market is open and competitive is both extensive and compelling. No party raises legitimate challenges to that evidence or reasonable claims that other facts should be considered.

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[33] The "safe harbor" rules were established in the FCC's *UNE Remand Order*, *Supplemental Order* and *Supplemental Order Clarification*. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, FCC 99-238, CC Docket No. 96-98 (rel. Nov. 5, 1999) ("*UNE Remand Order*"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, FCC 99-370, CC Docket No. 96-98 (rel. Nov. 24, 1999) ("*Supplemental Remand Order*"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, FCC 00-183, CC Docket No. 96-98 (rel. June 2, 2000) ("*Supplemental Order Clarification*"). Should AT&T desire to seek relief from those FCC requirements, the FCC has stated that "the requesting carrier may always petition the Commission for a waiver of the safe harbor requirements under our existing rules." *Supplemental Order Clarification*, ¶ 23.

The Department should conclude that there is sufficient competition to allow Verizon MA market-based prices to compete equally with other providers.

Respectfully submitted,

VERIZON MASSACHUSETTS

/s/Victor D. Del Vecchio
Bruce P. Beausejour
Victor D. Del Vecchio
185 Franklin Street, Room 1403
Boston, Massachusetts 02110-1585
(617) 743-2323

/s/Robert N. Werlin (by VDV)
Robert N. Werlin
Stephen H. August
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, Massachusetts 02110
(617) 951-1400

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